

Chad Fuller

D 858.509.6056

F 858.509.6040

chad.fuller@troutmansanders.com

October 24, 2018

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision, CG Docket No. 18-152, CG Docket No. 02-278 (Released October 3, 2018)

Dear Ms. Dortch:

On behalf of Anthem, Inc. ("Anthem"), a health benefits company with one of the largest memberships in the United States, I write to support asking the Federal Communications Commission ("FCC") to exercise its clear authority to issue a clear and comprehensive interpretation of the Telephone Consumer Protection Act ("TCPA").

The decision of the U.S. Circuit Court for the Ninth Circuit in *Marks v. Crunch*,¹ in light of contrary decisions elsewhere,² illustrates the inconsistent approaches taken by the judiciary in its interpretation of the TCPA in wake of the *ACA International, et al. v. FCC*³ decision. It is not too much to say that chaos reigns in the courts.⁴ Fortunately, the FCC can impose a single nationwide interpretation, creating a predictable and uniform legal environment for businesses and consumers alike. Anthem notes that submitted comments uniformly reflect the view that the FCC should exercise its power to interpret the TCPA.⁵

¹ No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

² *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018).

³ 885 F.3d 687 (D.C. Cir. 2018).

⁴ Indeed, two district courts recently reached diametrically opposed conclusions, on the same day, regarding the impact of *ACA International* on the definition of an "automatic telephone dialing system." *Compare Herrick v. GoDaddy.com LLC*, No. CV-16-254, 2018 U.S. Dist. LEXIS 83744 (D. Ariz. May 14, 2018) (adopting narrower definition of ATDS); *with Reyes v. BCA Fin. Servs.*, No. 16-24077, 2018 U.S. Dist. LEXIS 80690 (M.D. Fla. May 14, 2018) (definition of ATDS had not changed).

⁵ Congress intended that the TCPA be subject to a uniform, national interpretation. Congress granted the FCC broad authority to interpret the TCPA, *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 467 (6th Cir. 2010), and, under the Hobbs Act, the FCC's final orders can only be reviewed by direct appeal in the United States Courts of Appeals. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). Courts have recognized and deferred to the FCC's primary jurisdiction regarding TCPA interpretation. *Scoma Chiropractic, P.A., et al v. Dental Equities, LLC, et al.*, No. 16-cv-62942, 2018 U.S. Dist. LEXIS 92736. (M.D. Fla. May 4, 2018).

By way of showing the practical impact of uncertainty, Anthem makes calls and texts that help patients and improve healthcare outcomes. On October 13, 2017, a bipartisan group of members of the House of Representatives, led by Representatives Bilirakis and Cardenas, sent a letter supporting regulatory action to protect pro-consumer calls by health benefits companies,⁶ observing that these “helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”⁷ Senators Booker and Nelson also sent a bipartisan letter to Chairman Pai on November 3, 2017. They noted that the calls and text messages convey “important medical and treatment information” and “improve patient outcomes.”⁸

The current chaotic legal environment in the courts, however, leaves companies like Anthem speculating as to the rules that apply to its calls under the TCPA, and facing the prospect that the rules laid down by the courts in one part of the country are different from those in another part of the country. Especially given the draconian legal exposure under the TCPA for guessing wrong, this uncertain and varying legal environment chills the pro-consumer calls that Anthem needs to make to help patients and improve outcomes.

In sum, Anthem asks that the FCC take prompt, clear, strong, and comprehensive action to construe the TCPA in light of *Marks*.

Sincerely,



Chad R. Fuller

⁶ On July 18, 2016, Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management (the “Joint Petitioners”) submitted a Joint Petition seeking clarification of the 2015 TCPA Omnibus Order as to consent for healthcare related calls. Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2015). The Joint Petition and became ripe for decision on October 4, 2016, with the passing of the deadline for reply comments. The Joint Petition focused on issues of prior express consent for important, health-care related calls and enjoyed overwhelming support on the docket and bipartisan support from members of Congress.

⁷ See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 2 (Oct. 13, 2017).

⁸ See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017).